(3)

No. 91-846

In The

Supreme Court of the United States

October Term, 1991

IRVIN JAY MILZMAN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether Rule 613(b), Fed.R.Evid., which allows extrinsic evidence of a prior inconsistent statement to be admitted to impeach a witness if the witness is afforded the opportunity to explain or deny the inconsistent statement, is rendered inapplicable whenever the witness has testified that he does not remember making the prior inconsistent statement?

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TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

Pursuant to Supreme Court Rule 15.6, this reply brief is presented.

REASONS FOR GRANTING THE WRIT

1. The Government's Version Of The Record Is Incomplete

At page 2 of its response, the government states that "Schneider testified that petitioner sold methamphetamine for Robinette. 6 Tr. 1442". This statement overlooks the fact that Schneider's testimony in this regard was based upon what John Robinette had

allegedly told Schneider at some unspecified time and place and without any reference to whether Petitioner was present when Robinette spoke with Schneider.

Also at page 2 of its response, the government recounts an alleged meeting between Schneider, Robinette and Petitioner regarding a reduction in price for the drug due to the volume Petitioner was buying and the manner of payment. A review of the record reflects that Schneider's testimony on direct examination relating this alleged meeting was nebulous at best: no time, place or list of persons present was even elicited by the prosecution. 6 Tr. 1442-1450.

At page 5 of its response, the government asserts that Schneider extensively testified concerning his first hand observations of Petitioner's dealings with Robinette. However, a review of Schneider's entire testimony on direct examination by the government, 6 Tr. 1405-1464, reflects approximately 8 pages that relate to Petitioner. See 6 Tr. 1442-1450. This testimony consistently was vague, at best, as to Schneider's basis of knowledge, let alone the time, place and persons present during the alleged conversations.

The habitual vagueness of Schneider's testimony is an important consideration. The refusal or inability of a witness to give details of an event or even to identify the time, place and persons present insulates the witness from effective cross-examination. The following between the prosecutor and the District Court prior to Schneider's testimony bears repeating:

> "Mr. Snyder: Your Honor, may I make a point here?
>
> The Court: Sure.
>
> Mr. Snyder: The witness is not saying he didn't make the statement, the witness is saying he doesn't recall, which is not impeachable.
>
> The Court: That's true.

Mr. Snyder: It's not impeachable if they're saying, 'I don't remember.'

The Court: That's true." 3 Tr. 708.

Accordingly, on cross-examination of Wes Schneider, counsel for Petitioner (and other co-defendants, for that matter) attempted to elicit specifics from Schneider regarding certain conversations. Schneider recalled that there had been a conversation in the parking lot of J. Calendars by and between himself and Petitioner and in the presence of Jim Parker. Schneider also testified **he could not recall what was said during that conversation**. 6 Tr. 1515. **Schneider asked counsel for Petitioner to attempt to refresh his memory, but the government objected before Petitioner's counsel could attempt to refresh Schneider's memory. The District Court sustained the government's objection and thus Petitioner was not allowed to attempt to refresh Schneider's memory**. 6 Tr. 1515.

Petitioner subsequently called Jim Parker to the witness stand to testify to the essence of the conversation, the same conversation which Schneider testified he could not remember and which the government did not want Schneider's memory to be refreshed upon. **Parker was not allowed to testify due to the government's objection that Parker's testimony was hearsay**. 7 Tr. 1647-1648. Petitioner explained to the District Court that Schneider had claimed that he did not recall the conversation and that such denial was a sufficient predicate to justify impeachment. The government's objection was sustained by the District Court. 7 Tr. 1648. A proffer was made at the recess to establish Parker's testimony. At that time, the following occurred:

Q (by Petitioner's counsel): And I'll ask you to state, what was said in that conversation, the best you can recall it?

A (Parker): **It was after the dinner was over, we went to the parking lot, and there was some discussion. I don't remember how it came up.**

> **Jay (Petitioner) asked Wesley Schneider what he had told his attorney about him, and 'Wes' said that he said that he thought he was one of John Robinette's distribution points. And Jay said "you shouldn't be telling your attorney that, it's not so. I don't appreciate you spreading those kind of things about me," at which point 'Wes' said, "Well, perhaps I'm wrong. I'm sorry I brought it up."** 7 Tr. 1655-1656.

Petitioner then re-offered the testimony to impeach the testimony of Wes Schneider. The District Court denied the offer and stated the following:

> "Well, Mr. Dunnam, your client has the absolute right to refuse to testify – to remain silent or to testify, but he doesn't have the right to present his evidence through another witness in that manner, so that will be denied." 7 Tr. 1656.

It is against the foregoing factual background that the government's response to the petition for writ of certiorari needs to be examined. First, it should be clear that at trial, the government affirmatively misled the District Court as to when a witness can be impeached. There can be no question that the colloquy by and between the prosecutor and the District Court, quoted above, is directly contrary to the clear language of Rule 613(b), Fed. R. Evid.

Furthermore, it should also be clear that contrary to the government's response at pages 4 to 9, Parker's testimony (quoted above) leaves no doubt that Schneider's statement in the parking lot – that he **thought** that Petitioner was one of Robinette's major distributors, but that he might be wrong – is inconsistent with Schneider's earlier testimony that, by virtue of his conversations with Robinette and/or Petitioner, he **knew** that Petitioner was a major distributor for Robinette. In other words, Parker's testimony, if introduced before the jury, would have cast doubt upon Schneider's veracity that he had been privy to conversations with Robinette and Petitioner,

since those conversations allegedly would have resulted in incriminating statements by Petitioner, but Schneider admitted in the parking lot that he had told his lawyer that he (Schneider) had **thought** Petitioner was a major distributor. If Schneider had been **told** that Petitioner was a major distributor – either by Robinette or Petitioner – he never would have told his lawyer that he only **thought** that Petitioner was a major distributor and that he might be wrong about what he **thought**.[1] Simply stated differently, Schneider's statement in the parking lot, as related by Parker, was substantially inconsistent with his (Schneider's) earlier testimony during the trial. The government's efforts to minimize the clear inconsistent nature of Schneider's statements in the parking lot are without merit and should be rejected.

In addition, the government's attempts to characterize Schneider's lack of memory as insufficient justification for impeachment should be rejected because of the prosecutor's position at trial. Indeed, the government should not be allowed to argue that Schneider could not be impeached when the prosecutor objected to any effort by Petitioner to refresh Schneider's memory. **Cf.** *Steagald v. United States*, 451 U.S. 204, 101 S.Ct. 1642 at 1646, 68 L.Ed.2d 38 (1981). The government's inconsistent positions – indeed, its effort to whipsaw Petitioner – should not be rewarded by this Court!

2. The Government's Version Of The Opinion Below Is Incomplete

At page 9, in the text accompanying footnote 1 of the government's response, the government asserts that the

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[1] This is supported by the fact that the cross-examination of Schneider reflects that Schneider could not identify even one occasion when he allegedly saw Robinette give Petitioner methamphetamine or even saw Petitioner with methamphetamine. 6 Tr. 1512-1514.

position asserted by Petitioner is belied by the Court's citation to *United States v. Sisto*, 534 F.2d 616 (5th Cir. 1976), because *Sisto*

> " . . . states that a prior inconsistent statement may be proved by extrinsic evidence 'if on cross-examination the witness has denied making the statement, **or has failed to remember it.**' Id. at 622 (emphasis added)."

However, the government has failed to mention the fact that in the opinion below, the Fifth Circuit omitted the language "**or has failed to remember it**" from the citation to *Sisto*. When a Court cites half of the proposition of law and omits the other half of the proposition of law, it is a fair conclusion that the Court has overruled the second half of the proposition.

Indeed, the penultimate portion of the Court's opinion bears repeating:

> "It is well-settled that evidence of a prior inconsistent statement is admissible to impeach a witness. Proof of such a statement may be elicited by extrinsic evidence **only if the witness on cross-examination denies having made the statement**. **United States v. Sisto**, 534 F.2d 616 (5th Cir. 1976). The issue in this case is whether Schneider's failure to remember the statement constitutes such a denial. If so, then the district court erred in excluding Parker's testimony as hearsay, because it was not being offered to show whether Milzman was distributing Robinette's drugs but, rather, to impeach Schneider's credibility. See Fed. R.Evid. 801(c)."
>
> "We hold that on the facts of this case, Schneider's claim of faulty memory did not constitute an inconsistent statement. **See United States v. Balliviero**, 708 F.2d 934, 939-40 (5th Cir.), **cert. denied**, 464 U.S. 939, 104 S.Ct. 351, 78 L.Ed.2d 316 (1983). Thus, because Parker's statements could not be used to impeach Schneider, his

> testimony clearly constituted inadmissible hearsay." (emphasis added) Appendix A at page A-40-41.

The government's effort to twist the Court's holding is an interesting exercise, but falls short of the mark. The Court clearly said that proof of such a statement may be elicited by extrinsic evidence **only if the witness on cross-examination denies having made the statement**. This is an inaccurate statement of the law as set forth in *Sisto* and as embodied in Rule 613(b). Apparently, the government would have this Court believe that the term "only" has taken on a new and mystic meaning!

Furthermore, the Court's assertion that Schneider's failure to remember the conversation did not constitute a denial of the conversation is a curious statement in light of the government's successful effort to block any effort to refresh Schneider's memory at trial. Of course, since Schneider clearly claimed not to recall the conversation, although he remembered that there had been a conversation, Schneider did not deny that the conversation occurred: he was simply never confronted with the essence or specifics of the conversation due to the government's objection.

3. The Government's Assessment Of The Law As Applied To The Facts Is Incomplete

At page 4 of the government's response, the government cites two cases for the proposition that a district court has considerable discretion in determining whether a witness's prior statement is inconsistent with his or her testimony at trial. The government then states that the District Court acted within its discretion because the statement was not inconsistent, thereby implying that the District Court in this case made such a finding. Response at 4.

First, it should be noted that the District Court in this case made no such finding! Quite to the contrary, the

colloquy between the prosecutor and the Court regarding the fact that an inability to recall did not allow impeachment (quoted above) as well as the Court's comments at the time of the defensive proffer of Mr. Parker's testimony (also quoted above) unequivocally demonstrate that the Court made no such finding!

Second, the cases cited by the government – *United States v. Causey*, 834 F.2d 1277 (6th Cir. 1987) and *United States v. McCrady*, 774 F.2d 868 (8th Cir. 1985) actually support Petitioner's position. In *United States v. Causey, supra*, the government called one Mrs. Jackson as a rebuttal witness to the defendant's alibi witness. Once on the witness stand, Mrs. Jackson testified that she could not remember any conversation with an FBI Agent concerning the defendant's alibi witness. The government then called the FBI Agent who testified to his memory of the conversation he had with Mrs. Jackson. On appeal the Court held that a district court does have considerable discretion in determining whether the testimony is inconsistent with the prior statement, and inconsistencies can be found in changes in positions implied through silence **or a claimed inability to recall**. The Court upheld the government's impeachment of Mrs. Jackson **because what Mrs. Jackson told the FBI Agent was inconsistent with her testimony at trial that she did not recall the conversation with the FBI Agent.**

In *United States v. McCrady, supra*, the Court cited *United States v. Dennis*, 625 F.2d 782, 795 (8th Cir. 1980) for the proposition that "[i]nconsistency is not limited to diametrically opposed answers but may be found in evasive answers, **inability to recall**, silence, or changes of position." (emphasis added). Clearly, a witness who claims not to recall a conversation should be able to avoid impeachment simply if he is convincing in his statements that he cannot recall the conversation. The jury should be allowed to ascertain whether the witness is testifying truthfully about his inability to recall the conversation,

and the substance of the conversation the witness allegedly cannot recall is the only manner by which the jury can ascertain whether the witness truly did not recall the conversation. In other words, the nature of the conversation and the circumstances surrounding the conversation and the conversation itself must be allowed to be introduced if the jury is to make an intelligent assessment of whether the witness was truthful in his claimed inability to recall or whether the witness was attempting to avoid being confronted with the prior statement in the courtroom by feigning lack of recall.

Furthermore, in the present case, the conversation in question was not collateral, but related to a key meeting that occurred after an alleged co-conspirator was arrested and began cooperating with the government. The meeting allegedly was to ascertain what was going to occur in the future due to the arrest and cooperation of the co-conspirator. Incredibly, a non-co-conspirator – Mr. Parker – was with Petitioner at the meeting. Mr. Parker's presence lent credence to the proposition that attendance at the meeting was not necessarily indicative of membership in the conspiracy. Thus, Petitioner's presence at the meeting did not necessarily mean he had been a co-conspirator. The exchange in the parking lot between Schneider and Petitioner in the presence of Parker is further evidence supportive of the proposition that Petitioner was not a co-conspirator and would have served to impeach Schneider's belief that he was a co-conspirator. And, finally, the exchange between the District Court and Petitioner's counsel after Parker's testimony was proffered clearly reflects that the District Court was going to allow Petitioner to testify to the conversation if he took the witness stand in his own defense. Thus, the District Court did abuse his discretion, for in essence the District Court was forcing Petitioner to waive his Fifth Amendment right in order to introduce the impeachment evidence, for clearly Mr. Parker was also competent to testify to the

impeachment. In other words, the only way Petitioner was going to be allowed to impeach Schneider was if he waived his Fifth Amendment privilege and took the witness stand, despite the availability of Mr. Parker.

CONCLUSION

The government's response is devoid of merit. The petition for writ of certiorari should be granted.

Respectfully submitted,

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